United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2089

IN THE

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

B
P/S

NO. 75-2089

JAMES L. COBBS

Petitioner Appellant

VS.

CARL ROBINSON, WARDEN,
CONNECTICUT STATE PRISON
SOMERS, CONNECTICUT

Respondent Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

PETITIONER APPELLANT'S BRIEF

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ISSUES PRESENTED FOR REVIEW

I. Does denial of the right to counsel in the grand jury proceedings, at which the accused is entitled to be present and examine the witnesses as a matter of Connecticut law, violate petitioner's rights under the Sixth and Fourteenth Amendments?

II. Does denial of a stenographer and court record of the proceedings and testimony before the grand jury constitute a violation of petitioner's rights to due process and equal protection under the Fifth and Fourteenth Amendments?

III. Was the grand jury which indicted the petitioner selected in violation of petitioner's rights to due process and equal protection under the Fourteenth Amendment?

IV. Was the petit jury, which found the petitioner guilty of murder in the first degree selected in violation of the petitioner's rights to trial by an impartial jury under the provisions of the Sixth Amendment and in violation of petitioner's right to due process and equal protection under the Fifth and Fourteenth Amendments?

V. Were statements made by the petitioner, without the assistance of counsel, during an in-custody interrogation, admitted in evidence against him in violation of his

right to have the assistance of counsel for his defense under the provisions of the Sixth Amendment and in violation of his rights to due process and equal protection under the Fifth and Fourteenth Amendments?

CASES AND AUTHORITIES CITED

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.----------

2. This case also involves the Constitution of the State of Connecticut Art. 1, Section 8. Rights of accused in criminal prosecutions; due process; excessive bail or fine; presentment of a grand jury.----------15,20

3. This case also involves the following provisions of the Connecticut General Statutes:

Section 51-70a.	Parties May Request Stenographic Notes be Taken in Circuit Court.----------33
Section 51-217.	Qualification of Jurors.------46, et.sec.
Section 51-218.	Jury Service for Women.-------48
Section 51-219.	Exemption from Jury Service.--46, et.sec.
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Section 54-86a.	Certain Evidence to be Made Available to Defendant.-------29

JURISDICTION

The judgment of the Supreme Court of the State of Connecticut affirming petitioner's conviction was entered on April 3, 1973. Petitioner then petitioned for a writ of certiorari to the Supreme Court of the State of Connecticut, in the Supreme Court of the United States, which petition for certiorari was denied in October of 1973, decision number 73-5030. A Habeas Corpus petition was submitted to the United States District Court, District of Connecticut, pursuant to the provisions of 28 USC §2241, which petition was dismissed on its merits on May 5, 1975. The opinion dismissing the petition was rendered by Judge Jon O. Newman. This appeal, taken pursuant to 28 USC §2253, followed the dismissal of the petition below.

STATEMENT OF THE CASE

On August 28, 1966, one Batista Carbone was found dead of strangulation and stab wounds in his apartment in Bridgeport, Connecticut, his death having, apparently, occurred during the perpetration of a burglary and/or a robbery.

The petitioner was arrested on May 16, 1967, at 9:00 a.m. by the Bridgeport Police as the result of an arrest warrant issued by a judge of the Circuit Court charging him with the murder of Batista Carbone. The petitioner was, after his arrest, taken to the Bridgeport Police Headquarters, where he remained until approximately 1:30 p.m. or 1:45 p.m. when he was presented before a Circuit Court judge. While petitioner was in the Bridgeport Police Headquarters and before he had the assitance of counsel, a session of questioning was conducted wherein which he made statements which were later used against him during his trial.

On or about June 1, 1967, the petitioner was taken from the jurisdiction of the Circuit Court and arrested on a bench warrant issued by the Superior Court for Fairfield County charging him with the murder of Batista

Carbone. Upon his arraignment in Superior Court, the public defender for Fairfield County was appointed to represent him.

On or before June 19, 1967, a grand jury was summoned by the High Sheriff for Fairfield County, and as required by Art. 1 Section 8 of the Connecticut Constitution, the State's Attorney for Fairfield County presented a bill of indictment against the petitioner before the grand jury. In accordance with well-established principles of Connecticut common law criminal procedure, the petitioner was permitted to be present in the grand jury room to listen to the evidence and, upon information and belief, was given the opportunity to examine witnesses. After the hearing, the grand jury returned an indictment accusing the petitioner of the crime of murder in the first degree and charging that he did kill Batista Carbone in violation of the Connecticut General Statutes.

Subsequently, on February 9, 1968, the petitioner filed a plea in abatement and a motion to quash the indictment, wherein he claimed, inter alia, that the grand jury which had indicted him was not an impartial jury drawn from a cross-section of the community and resulted in a systematic and intentional exclusion of certain electors in violation

of the equal protection clause and the due process clause of the Fourteenth Amendment and further that he was not allowed to have counsel with him during the grand jury proceedings and that the grand jury did not have recorded minutes of the testimony given before it. (Finding 21, page 80, Exhibit 4)

The petitioner's plea in abatement was overruled and his motion to quash denied by the Court without opinion. (Page 3, Exhibit 4)

The substantive issues raised by the petitioner by his plea in abatement and motion to quash were considered and decided by the Connecticut Supreme Court.

Prior to the selection of the petit jury, the petitioner filed a challenge to the array in which he claimed, inter alia, that the jury panel did not constitute a body impartially selected from a cross-section of the community, that the statutory law of the State of Connecticut was not complied with in the selection of the jury panel and finally, that the procedure followed in selecting the jury panel was in violation of the petitioner's rights under the Sixth Amendment of the Constitution of the United States. (Page 4, Exhibit 4)

The petitioner's challenge to the array was denied by the Court, without written opinion. (Page 5, Exhibit 4)

The substantive issues raised by the challenge to the array were considered and decided by the Connecticut Supreme Court.

During the course of the petitioner's trial, the petitioner sought to exclude from evidence statements made by him between the time of his arrest and his arraignment because he was denied access to counsel during this time, in violation of the applicable provisions of the Connecticut and Federal Constitutions. (Finding 432, Page 139, Exhibit 4)

A hearing was held by the Court on the issues thus raised without the jury present. (Page 127 Et. Seq., Exhibit 4)

The petitioner's statements were admitted into evidence and his claim that they should be excluded, overruled by the trial court. (Page 139, Exhibit 4)

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The legal issues presented by this case involve the application of the principles of due process, equal protection, right to counsel and right to trial by an impartial jury to a capital offender sentenced to life imprisonment.

Although a paramount issue sought to be reviewed is the right to counsel and a transcript of the proceedings before the grand jury within the framework of Connecticut's unique grand jury procedure (see Part I, infra), the right to counsel before a grand jury presents a constitutional question of potentially very broad application to all jurisdictions. It is an issue on which the Supreme Court of the United States has not spoken since In Re Groban, 352 U.S. 330, 332-3 (1957), and then only by dictum.

I

THE CONNECTICUT PRACTICE OF PERMITTING AN ACCUSED TO BE PRESENT IN THE GRAND JURY ROOM AND TO EXAMINE WITNESSES, BUT DENYING THE RIGHT TO COUNSEL, VIOLATES DUE PROCESS, RIGHT TO COUNSEL AND EQUAL PROTECTION.

In the case of one accused of a capital crime, as was the petitioner, Article First, Section 8 of the Connecticut Constitution requires formal indictment by a grand jury. Ever since Lung's Case, 1 Conn. 428 (1815), this has meant in practice that the grand jury is directed to "cause the prisoner and the witnesses to come before you". And, although denying the prisoner the right to counsel, the following direction was added by the then nine judges of the Connecticut Supreme Court:

> "You will permit the prisoner to put any proper questions to the witnesses, but not to call any witnesses on his part." Ibid.

This procedure, which would appear to be unique among all the jurisdictions,[1] has been continued by the "liberality of our practice..." State v. Fassett, 16 Conn. 457 at 468 (1844), and evolved into a right accorded to prisoners accused of capital offenses, a right which "is almost invariably exercised..." State v. Stallings, 154 Conn. 272, 282

1. Research discloses no other state permitting the presence of the accused, and many forbid such presence by statute. 38 C.J.S., Grand Jury, Section 39.

(1966). A recent decision characterized this "usual Connecticut practice" in the following terms:

> "Fourthly, and probably of most importance of all, is our usage of permitting the accused ... to be in the grand jury room during the interrogation of witnesses by the grand jury and with the right himself to propound reasonable questions to the witnesses. It is easy to see how, especially in cases where the police have apprehended the wrong person and a simple question of identity is involved, an accused, by a few questions to the state's witnesses, might so weaken the state's case so as induce the grand jury to fail to return a first-degree murder indictment."
> State v. Menillo, 159 Conn. 264 at 277 (1970).

In addition, the grand jury is charged to exclude inadmissible evidence, being admonished to "restrict the evidence it elicits to that which is admissible in the trial of cases ..." State v. Kemp, 126 Conn. 60 at 71 (1939).

Connecticut's constitutional grand jury procedure appears to have no parallel in any other jurisdiction. Within its special framework, petitioner's assertions of constitutional denials take on special significance. Petitioner presents the case of an untrained, uncounseled layman, who was denied the right to counsel before the grand jury.

Petitioner's status before the grand jury in Bridgeport in June of 1967 was that of a de jure defendant, indeed a prisoner formally charged with the crime being "investigated". His "rights" to be present, to examine witnesses, to listen to the examination of other witnesses, without benefit of counsel, or even the translation or interpretation of what was being said, were no "rights" at all, but a sham and a mockery of justice.

Placed within this legal and factual context, the line of lower court cases which holds that the right to counsel before grand juries is not constitutionally mandated, is not at all apposite. See Gollaher v. United States, 419 F 2d 520, 523; United States v. Corallo, 413 F. 2d 1306 1330; In re Grumbles, 453 F 2d 119, 122; United States v. Duncan, 456 F. 2d 1401, 1407; United States v. Wolfson, 282 F. Sup. 772, 775; But CF, Sheriden v. Garrison, 415 F. 2d 699. These cases should be distinguished from the present appeal for several reasons:

1. They all involved Federal Grand Juries. Federal and Connecticut Grand Jury procedure have nothing in common beyond their respective constitutional mandates. (The Fifth Amendment requires a Grand Jury indictment in the case of a "Capital, or otherwise infamous crime ..." Article One, Section Eight of the Connecticut Constitution requires such

an indictment in the case of "any crime, punishable by death or life imprisonment...") Most significantly, the accused is customarily present and permitted to participate in Connecticut Grand Jury proceedings; he is absent under the Federal Rules. On the other hand, whereas the Government Attorneys are present and control Federal Grand Jury Proceedings, they are excluded from the Connecticut Grand Jury Room. The Federal Rule of secrecy generally denies to the Defendant the nature of the evidence presented before the Grand Jury, whereas a Connecticut accused, being present during the Grand Jury proceedings, and having the opportunity to examine and cross-examine witnesses is accorded full access to the evidence and testimony against him.

2. In Duncan, George and Grumbles, the person whose rights were being determined by the Court appeared before the Grand Jury only as a witness, and with immunity against prosecution.

3. In many of the cases listed above the person whose rights were being determined by the Court was not even in police custody when he appeared before the Grand Jury. The petitioner had been arrested and formally charged at that stage of the proceedings against him. The unique Connecticut Grand Jury procedure had clearly "focused" on him as a criminal defendant.

Much more in point are the leading cases of the Supreme Court of the United States expanding the right to counsel and recognizing the necessity for this "guiding hand ... at every step in the proceedings" against an accused, both "before and after formal indictment." Powell v. Alabama, 287 US 45, 69 (1932); Hamilton v. Alabama, 368 US 52, 54 (1961); White v. Maryland, 373 US 59 (1963) Escobedo v. Illinois, 378 US 478, 486 (1964); and, Coleman v. Alabama, 399 US 1, 7-10 (1970).

It is of interest to note that a recent decision handed down by the Ninth Circuit has extended the right to counsel to Civil contempt proceedings arising out of an indigent's refusal to answer questions put to him by a Grand Jury. In the Matter of Grand Jury Proceedings, United States v. Kang, 468 F. 2d 1368 (9th Cir. 1972). Although the Court conceded that it could find no authority requiring the appointment of counsel under such circumstances, it concluded that there was such a right to counsel even in a civil proceeding, so long as the "threat of imprisonment is the coercion that makes a civil contempt proceeding effective." At 1369.

Given the posture of petitioner's case, due process, the right to counsel and equal protection form a constitutional configuration of significant dimensions, lying at

the very center of this petition. Some eighty years ago, the United States Supreme Court characterized a grand jury proceeding as a "criminal case" within the meaning of the Fifth Amendment. Counselman v. Hitchcock, 142 U.S. 547, 562 (1892). The logic of Powell and Escobedo surely demands application of right-to-counsel safeguards to grand jury proceedings whose purposes are to determine probable guilt. See The Supreme Court, 1963 Term, 78 Harv. L. Rev. 143, 222-3 (1964). Indeed, in light of the decisions cited in the preceding paragraph, as well as Miranda v. Arizona, 384 U.S. 436 (1966), petitioner presents an a fortiori case.

In Coleman, supra, the Supreme Court of the United States considered the function and character of the Alabama preliminary hearing. The Court noted that the hearing

> "seeks to determine whether there is probable cause for believing that a crime has been committed, and whether the accused is probably guilty, in order that he may be informed of the nature of such charge, and to allow the state to take the necessary steps to bring him to trial." Coleman, supra, at 8.

This function is similar to that ascribed to the Connecticut grand jury by the Supreme Court of the State of Connecticut in State v. Menillo, supra. In that case, the court stated that the grand jury in Connecticut, "determines whether there is probable cause to justify putting

the accused on trial ..." State v. Menillo, supra, at 274.

It is significant that in Coleman, supra, the United States Supreme Court held that the Alabama preliminary hearing was a critical stage of that state's criminal process, at which the accused was entitled to have counsel present. Coleman, supra, at 10. Measured against Coleman, the case at bar presents itself a fortiori. Denial of counsel here did not occur at a hearing preliminary to presenting the case before the Grand Jury, but rather at and before the Grand Jury itself! The proceeding in this case was and is constitutionally mandated, not, as in Coleman, descretionary with the prosecutor.

Connecticut's unique Grand Jury hearings clearly occur at a critical stage of the proceedings against the accused. Unlike the situation in other states, the presence of the accused, often a prisoner, in the Courtroom is as an actual Defendant charged as such before the Grand Jury. State v. Fassett, Supra. The "focus" upon him is clear and unmistakeable. It makes no sense to suggest that the indictment is not a critical stage of the criminal process. Can the State seriously contend that the right to counsel admittedly attaches to in-custody interrogation and identification, to preliminary

hearings and arraignment, but that it somehow "leapfrogs" over the indictment procedure? See Jones v. United States, 342 F. 2d 863, 870 (D. C. Cir. 1964).

There are both pitfalls and opportunities for the prisoner in being present and in being permitted to examine witnesses, as, for example:

1. The need for timely assertion and maintenance of the privilege against self-incrimination so as to avoid waiver under Rogers v. United States, 340 U.S. 367, 374-5 (1951).

2. The need for timely objection to grand jurors based on prejudice or other disqualification.

3. Exclusion of illegally obtained or otherwise inadmissible evidence.

4. Opportunities for cross-examination and possible impeachment of witnesses.

5. Opportunities for discovery.

6. The subsequent right to bail. (Cf. Conn. Const., Art. 1 Section 8 as construed in State v. Menillo, supra, 277.)

The only state with a comparable exception to the general rule excluding the accused from grand jury proceedings is Georgia, which has specifically recognized the

necessity for breathing life into the accused's rights by granting him the right to counsel. Sections 40-1617 and 89-9908 of the Georgia Code permit state and county officials charged with misfeasance or malfeasance in office to be present during interrogation of witnesses with rights of cross-examination. Although the statute said nothing about the right to counsel and such right was generally denied, the Georgia Supreme Court in 1960 declared that the statute necessarily included the right to counsel, holding:

> "To grant to a defendant the right to appear and be heard, to offer testimony on his own behalf, and to cross-examine the witnesses testifying against him, while denying the right to the privilege and benefit of counsel for the effective presentation of his own evidence and the effective cross-examination of the witnesses against him, would, we think, be to grant an empty, useless right -- one that could avail him little." Cadle v. State, 101 Ga. App. 175, 183-4, 113 S.E. 2d 180, 187 (1960).

The Cadle decision was based on the right to counsel in the state and federal constitutions, as well as Powell v. Alabama, supra. In 1967, although the statutes were amended so as to eliminate the accused's rights of cross-examination and presentation of witnesses in his own behalf, he was still accorded the right to be present and the right to counsel nevertheless. Thus, the only other state with

comparable grand jury procedure, permits and protects the right to counsel even absent the right to examine witnesses as is the Connecticut practice.

Although the Connecticut grand jury practice has unique characteristics, the general right to counsel before a grand jury has not been considered by the United States Supreme Court since the Groban case, which was a five to four decision.

Writing the principal opinion for the Court, Mr. Justice Reed spoke only for himself and two other members of the Court[2] in holding the "guiding hand of counsel" as unnecessary when a witness was called upon to give testimony at a proceeding conducted by the state fire marshall to investigate the causes of a fire. The four dissenters in that case (Justice Black, joined by Chief Justice Warren and Justices Douglas and Brennan), despite difficulties in classifying the fire marshall's investigation as "criminal" felt impelled to support the inviolability of the right to counsel as a matter of due process.

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[2] Justices Frankfurter and Harlan joined in a concurring opinion which likened the fire marshall's investigation to a workmen's compensation proceeding, stressing the fact that "... the fire marshall is not a prosecutor ..." 352 U.S. 330, 336 (1957).

It should be noted that the four dissenters in Groban became the majority in Hamilton, White, Escobedo and Miranda. Perhaps even more significant is the fact that the dissenting opinion in Groban was cited with approval in the Court's opinion in Miranda, supra, 466 at note 36.

Whatever distinction may be thought to have existed when Groban was decided, as between a "criminal case" under the Fifth Amendment and a "criminal prosecution" under the Sixth, was completely vitiated by Escobedo and in the recent more explicit opinion in Coleman. In construing the right-to-counsel guarantee of the Sixth Amendment, this Court has declared:

> "It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." (Emphasis added) United States v. Wade, 388 U.S. 219 at 226 (1967).

Nor the need the petitioner demonstrate a specific showing of prejudice from denial of counsel. This rule has been clear from at least as early as Glasser v. United States, 315 U.S. 60 at 76 (1942), where the Court held:

> "The right to have the assistance of counsel is too fundamental and absolute

> to allow Courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

While the Glasser decision involved a Federal prosecution, hence the Sixth Amendment right to counsel, this Circuit has specifically recognized that the Glasser rule applies to the review of State Court murder convictions. See U. S. Ex. Rel. Cooper v. Denno, 221 F. 2d, 626 at 628 (1955).

II

DENIAL OF A STENOGRAPHER TO RECORD GRAND JURY MINUTES IN A CAPITAL CASE CONSTITUTED DENIAL OF DUE PROCESS AND EQUAL PROTECTION AND, INDIRECTLY, EFFECTIVE ASSISTANCE OF COUNSEL.

The constitutional infirmity posed by denial of counsel was compounded by denial to petitioner of a stenographic record of the grand jury proceedings. The combined absence of both counsel and record could only serve to deprive petitioner of several vital tools for his defense both before (motion to quash) and at trial.

Without a stenographic record of the grand jury proceedings available to him, petitioner's counsel was, except insofar as he might be able to garner this information from the verbal report of his client, unaware of and unable to consider various portions of the proceedings before the grand jury that might have been invaluable to him at trial, to wit:

1. Inconsistencies and contradictions in the testimony of the witnesses.

2. Bias on the part of one or more of the jurors.

3. Evidence which was illegally obtained or otherwise tainted.

4. Exculpatory information or evidence.

5. Presentation of testimony favorable to the accused by a witness who might not later be produced by the state at trial.

Bearing these factors in mind, as well as the panoply of facts and legal issues which can emerge in the course of grand jury proceedings, a transcript becomes essential, not only as a matter of due process and equal protection, but as an essential tool for complying with the Sixth Amendment's requirements of effective representation.

The indictment process, not unlike the pretrial arraignment (Hamilton) and the preliminary hearing (Coleman), is a critical stage where important rights may be sacrificed or lost. Denial to counsel of access to a stenographic grand jury record necessarily bars valuable information needed to test the legal validity of the indictment itself, such as irregularity of the Grand Jury proceedings, violation of constitutional rights, illegality or insufficiency of the evidence and so on.

Although, concededly, there is no requirement under Rule Six of the Federal Rules of Criminal Procedure that testimony before the Grand Jury be transcribed verbatim, several decisions of this Circuit have reiterated that a stenographic record is the better practice "as a matter of

course..." United States v. Cramer, 447 F. 2d 210, 214 (2nd Cir. 1971). Also see United States v. Gramolini, 301 F. Sup. 39 (U. S. District Court, D. Rhode Island, 1969). Professor Moore has noted that "fairness to the defendant would seem to compel a change in the (Federal) rules, particularly in view of the increasingly permissive use of minutes for purposes of impeachment." 8 Moore's Federal Practice, Sec. 6.02 (2) at 6 through 11.

The primary rational underlying the Federal Rules in this regard, namely, the tradition of Grand Jury secrecy, is obviously irrelevant to the Connecticut procedure which places the accused in the Grand Jury Room to observe and hear all of the testimony. There is no danger of his escape or of his tampering with the witnesses. Nor is there any kind of realistic hazard by way of disclosure of derogatory information presented to the Grand Jury since the accused is not sworn to secrecy and, depending upon his intelligence, education, ability to take notes, retentive abilities, memory and unknown other factors, can and should pass on to his attorney all of the information to which he is automatically made privy under Connecticut's unique procedure. The numerous Federal decisions which hold that there is no constitutional right to have a stenographer transcribe the testimony of witnesses before Federal Grand Juries are clearly not determinative

here in view of the distinctions between the functions and character of the Connecticut and Federal Grand Juries. (See United States v. Canchetti, 315 F. 2d 584, and United States vs. Cooper, 464 F. 2nd 648, and cases cited therein; also note discussion of these distinctions at Pg.15-16,supra.)

With the veil of secrecy that exists over the Grand Jury in some cases pierced, if not destroyed, as it is in Connecticut, the only purpose served by a denial of a transcript is the impairment of an accused's ability to make effective use, through counsel, of the evidence presented. The net effect is a dilution of effective representation by counsel in violation of the Sixth and Fourteenth Amendments.

A. Due Process.

Arbitrary denial of a stenographer at petitioner's grand jury proceedings in Connecticut lacks all basis in constitutional and statutory authority. As a rule of court governing a constitutional grand jury, it is blatantly lawless as a violation of due process, particularly as applied to petitioner, and particularly in a jurisdiction such as Connecticut where the prisoner is permitted to be present and to "put any proper questions to the witness..."

In the leading case of Brady v. Maryland, 474 U.S. 83, 87 (1963), the United States Supreme Court treated the suppression of evidence favorable to the accused as a violation

of due process, regardless of the prosecution's good faith.

The Brady rule was specifically applied to pretrial statements of a government witness which "appear inconsistent" with the testimony of that witness at trial. Giles v. Maryland, 386, U. S. 66, 74-6 (1967).

There has been a clearly discernible trend in constitutional law in the direction of "disclosure rather than suppression, of relevant materials..." in order to insure fairness in the "proper administration of criminal justice." Dennis v. United States, 384 U.S. 855, 870 (1965). Within two years of Dennis, the Court of Appeals for the Second Circuit directed that a defendant thenceforth should "be allowed to examine the grand jury testimony of those witnesses who testify at his trial without requiring him to show any particularized need for this material ..." United States v. Youngblood, 379 F. 2d 365 at 270 (2d Cir. 1967); see also, Allen v. United States, 390 F. 2d 476, 482 (D. C. Cir. 1968).

In 1967 the Connecticut statutes were amended to permit the defendant to inspect and copy "... (5) recorded testimony of the defendant before a grand jury..." Conn. Gen. Stat., Section 54-86a. Also, even without benefit of statute, Connecticut courts have traditionally held that a defendant, at trial, had the right to request the court to examine the

transcript of the grand jury hearing with discretion in the court to permit or deny disclosure to the defendant. State v. Hayes, 127 Conn. 543, 602 (1941). Such "rights" become hollow indeed where no such transcript exists!

Thus, the Connecticut practice permits the prosecutor to avoid the strictures and hazards of Brady, Dennis and Giles, by simply failing ro provide a stenographer. And, by systematically excluding counsel and prohibiting note-taking by the accused, the insulation of the grand jury proceedings becomes complete.

It may be as the Supreme Court recently declared, that the due process clause does not require the States to observe the Fifth Amendment's provision for indictment by grand jury. Alexander v. Louisiana, 405 U.S. 625. Nevertheless:

> "Once the State chooses to provide grand and petit juries, whether or not constitutionally required to do so, it must hew to federal constitutional criteria..." Carter v. Jury Commission, 396 U.S. 320 at 330 (1970). Also see Goss et al vs. Lopez et al U.S. 95 S. Ct. 729 (1975); and Morrissey v. Brewer, 408 U.S. 471, 481 (1972)

The state of Connecticut can present no compelling reasons for its refusal to provide for a permanent record of grand jury proceedings. Since grand jury hearings of the "constitutional" variety are usually only held to consider charges of murder and kidnapping, a requirement that the

state provide a stenographer for such infrequent and extremely important proceedings would not represent a significant economic burden upon the state. Nor does it present an administrative problem, since stenographers are presently used to record the judge's charge to the grand jury and could record the testimony before that body merely by remaining in the room after the "judge has left".

The state's desire for secrecy at grand jury hearings is hardly compelling in light of the fact that the accused himself is present during the entire proceeding. Finally the practice of barring the stenographer from the grand jury room so that the defendant cannot use grand jury testimony for the purpose of impeaching witnesses at trial would seem to be at odds with the Court's opinion in Coleman v. Alabama, supra, in which the importance of pretrial testimony for the purpose of impeachment was stressed.

B. EQUAL PROTECTION.

It should be noted that Connecticut has long recognized the right of an accused to a transcript of a preliminary hearing. Since 1963, an accused in this state has been entitled to a stenographic record of "any proceedings" in the Court of Common Pleas, which would, of course, include

hearings in probable cause. Conn. Gen Stat. § 51-70a.

The effect of this statutory provision is to guarantee to an accused the right to a stenographer and a transcript of any probable cause hearing. On the other hand, such a transcript is consistently denied to an accused such as petitioner at the probable cause hearing equivalent in the case of murder, namely the indictment stage itself. In effect, therefore, a murder defendant is denied that which a larceny or drug defendant is guaranteed!

Such procedural anomalies can hardly be reconciled with the constitutional guarantee of equal protection of the laws.

III

THE GRAND JURY WHICH INDICTED PETITIONER WAS SELECTED IN VIOLATION OF THE REQUIREMENTS OF THE FOURTEENTH AMENDMENT

In the opinion dismissing the petition below, the United States District Court adopted the Connecticut Supreme Court's description of the grand jury selection process. (see Memorandum of Decision, Newman, J., at page 3). This description was incomplete and inadequate in that it failed to include certain characteristics of the selection process which were established by the findings of the Connecticut Supreme Court, to wit:

1. The description fails to point out that the sheriff was personally acquainted with many of the persons on the grand jury list (finding 41, page 82, Exhibit 4); and

2. The description fails to point out that those selected for grand jury service were those who had the time to serve on the jury without interferring with their usual occupations. (finding 43, page 52-3, Exhibit 4).

Petitioner's claim is more than that the grand jury panel was formed from a selection process that was not "random". This process could not have resulted in a jury list which approximated a fair cross-section of the community. The list from which the grand jury was chosen was made up of 138

people, most of whom the sheriff knew personally. Most of these 138 people had been on the panel list since 1959. All of these people were of better than average intelligence. Rather than state that a cognizable group was excluded, it is appropriate to state that only the members of a small, unchanging group were included on the jury panel list!

The petitioner in this case was indicted in accordance with the requirements of section 54-45 of the Connecticut General Statutes which requires indictment for a capital crime by "... a grand jury of eighteen electors of the county where said court is sitting...". The grand jury is summoned by the High Sheriff of the county in which the court sits; he selects without statutory guidance or restriction.

The process used by the High Sheriff of Fairfield County in selecting the grand jury in this case, is detailed in the record, (pages 78-83, Exhibit 4).

The county over which the trial court had jurisdiction and from which the grand jury was chosen had a population in excess of 650,000 persons. From this pool the grand jury in this case was selected in this way. The sheriff maintained in his office, a list of 138 names (Exhibit 6, Defendant's Exhibit B), which was inherited

by him from his predecessor in office, and which was substantially the same list that was used for a grand jury panel since 1959. This list was maintained and the grand jurors names removed when they died, when they moved to different locations, or when they indicated to the High Sheriff that they no longer wished to serve on the grand jury. Names were occasionally added to the grand jury list, by the sheriff or persons known to the sheriff personally or on recommendation by his deputy or of someone who had high standing in the community. Many of the persons on the grand jury were personally acquainted with the sheriff and were persons of better than average intelligence. (Finding 41, page 82, Exhibit 4).

The list of 138 names, consisting of volunteers are the only persons in the county who have sat on grand juries; as of the time of the petitioner's indictment, most of them had had prior experience on homicide cases.

In summoning the grand jurors from the grand jury panel, the sheriff in this case went through the list and, tried to get the people he felt were "best suited" for service. He selected 44 names from the panel and tried to get eighteen to serve on the jury. In doing so, he used his judgment as to whom he thought would be best suited to the

particular case and in making the judgment, he considered the type of publicity the case had as well as the location of the crime, with an effort to keep away from that location in selecting a jury.

Petitioner's claim here, is that the process which was used by the sheriff in the selection of his grand jury was not one such as would assure to him a fair and impartial grand jury. Valid grand jury selection is a right protected by the Fourteenth Amendment. Reece v. Georgia, 350 U.S. 85, 87. Granted that the due process clause does not require the states to observe the Fifth Amendment's provision for presentment or indictment by a grand jury, Alexander v. Louisiana, 405 U.S. 625, 633, it is clear that, "once the State chooses to provide grand ... juries, whether or not constitutionally required to do so, it must hew to federal constitutional criteria." Carter v. Jury Commission, supra.

Carter was dealing with both petit and grand juries when it defined the jury as "a body truly representative of the community." 396 U.S. at 330. The inherent nature of the selection process used here assured that the grand jury panel could not be representative of the community. The people on the list were members of a small, unchanging group of the personal acquaintances of the sheriff and his deputy!

The Supreme Court was speaking of both grand and petit juries in Brown v. Allen, 344 U.S. 443, when it said, at page 474:

> "Our duty to protect the federal constitutional rights of all does not mean that we must or should impose on states our conception of the proper sources of jury lists, so long as the source reasonably reflects a cross-section of the population suitable and in character and intelligence for that specific duty."

See also, supporting the principle that grand and petit juries must be selected from bodies which fairly represent cross-sections of the community from which they are chosen, Bary v. U.S. 248 F. 2d 201 (10th Cir. 1957); U.S. v. Van Allen, 208 Fed. Sup. 331 (U.S. Dist. Ct. SD N.Y. 1962); Alvin Chance v. U.S., 322 F. 2d 201 (5th Cir. 1963); U.S. v. Tillman, 272 Fed. Sup. 908 (U.S. Dist. ND Ga. 1967); Goins v. Allgood, 391 F. 2d 692 (5th Cir. 1968); Crawford v. Bounds, 395 F. 2d. 297 (4th Cir. 1968); Carmical v. Craven, 457 F. 2d 582 (9th Cir. 1971); Smith v. Yeager, 465 F. 2d 272 (3rd Cir. 1972); U.S. v. Burkett, 342 Fed. Sup. 1264, (U.S. Dist. Ct. D. Mass. 1972)

The case at bar does not involve a case of racial discrimination in the selection of the grand jury as is so in the case of the Fourteenth Amendment cases which have reached the United States Supreme Court. Hermandez v. Texas, 347 U.S. 475. But as the decisions of the United States Supreme Court

make clear, the essential evil in the racial exclusion cases is the violation of an American tradition which contemplates an impartial jury drawn from a cross-section of the community. It is, as noted, the technique of selection which invalidates the resulting indictment, not necessarily a showing of specific discrimination in a given matter. In Avery v. George, 345 U.S. 559, the Court noted that they were not concerned with an actual showing of discrimination. Speaking of the Avery opinion, the United States Supreme Court in Williams v. Georgia, 349 U.S. 375, observed:

> "We need only add that it was the system of selection and the resulting danger of abuse which was struck down in Avery and not an actual showing of discrimination..." 349 U.S. at 382.

The opinion in Avery is cited with approval by Mr. Justice White, writing for the court in Alexander v. Louisiana, supra, which was a case involving racial discrimination. In its decision below, the District Court cited Alexander as placing the burden on the petitioner of establishing a prima facie case of discrimination against a cognizable group. Avery is quite significant for the petitioner here in that the decision suggests that a showing of discrimination can be founded upon the inherently suspect nature of the selection process itself. It was the opportunity for discrimination that the selection process

afforded that the court found intolerable in Avery. 345 U.S. at 562. The opportunity to discriminate was also inherent in the system utilized by the Fairfield County Sheriff; the sheriff tended to exclude people he did not know, people of only average intelligence, and people who resided in Bridgeport.

Alexander involved a challenge to a selection system which afforded the jury commissioners an opportunity to discriminate in its operation. It should be noted however that the system itself conceivably could have resulted in the selection of a grand jury from a representative cross-section of the community: the system itself was not inherently unfair; rather, the application of the system and the results achieved were intolerable.

The system under question here was no system at all. There was no chance that the grand jury would fairly represent a cross-section of the community. The list had not changed in years; the sheriff picked jurors from his personal acquaintances and on the recommendations of his associates.

Petitioner submits that the requirement that discrimination against a "cognizable group" be shown is nowhere to be found in the Alexander decision, despite the assertion to that effect in the opinion of the court below (see Memorandum

of Decision, Newman, J. at pgs. 4 and 5). Furthermore, "the complete list of cognizable classes is, of course, not a settled matter". Id at pg. 5.

In dealing with a system as blatantly unfair as the one in question, a showing of discrimination against a "cognizable group" should not be made central to petitioner's case. The system was founded on the whim and fancy of the sheriff. The opportunity to discriminate was clear.

The Court below stated that the petitioner here faces an "especially heavy burden" to show discrimination here, citing Fay v. New York, 332 U.S. 261. That case dealt with the blue ribbon jury system used in New York State. The court noted that "each of the grounds of elimination (of prospective jurors was) reasonably and closely related to the jurors suitability." 332 U.S. at 270. That could not be said of the exclusion on the basis of personal acquaintanceship in effect here.

The heavy burden imposed by Fay is clearly met here since petitioner was faced with a system not in any way based on a cross-section of the Fairfield County population. Discrimination was exercised against the massive group of everyday citizens who had nothing in particular to recommend themselves to the sheriff and his associates, and who weren't personally acquainted with the members of the sheriff's office.

The petitioner attacks the completely asystematic selection of jurors from among the personal acquaintances of the sheriff and his close associates. As one federal tribunal has held, in applying the Fourteenth Amendment to the selection of state juries:

> "... it is not enough for the jury commissioners or any other selecting agency to be concerned with persons of their personal acquaintance...it is their duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color." Bailey v. Henslee, 287 F. 2d 936 (8th Cir.)

This pronouncement was merely a re-affirmation of the command of the United States Supreme Court. Smith v. Texas, 311 U.S. 128; Cassell v. Texas, 339 U.S. 282.

The technique utilized by Connecticut in selecting the grand jury involved in this action, falls well short of the constitutional demand that the grand jury be truly representative of the community and the product of a cross-section of the community. Systematically and intentionally excluded from the grand jury, were all those persons in the county who were not personal acquaintances of the sheriff or his associates and who were not volunteers on the single, small, master grand jury panel which was in continuous use over a period of some eight years. (See findings 27 and 35, pages 81, 82, Exhibit 4).

The sheriff made an effort to exclude people residing in the area where the crime was committed in selecting the grand jury. (See findings 30 and 32, page 81, Exhibit 4). He thus excluded persons who resided in Bridgeport, the most populous City in Fairfield County, as well as persons who were not of better than average intelligence. (See finding 42, page 82, Exhibit 4).

It is evident that the sheriff and his associates failed to fulfill their affirmative duty to seek and, include within the grand jury selection process, all persons qualified to serve under state law. Bailey v. Henslee, supra, and Carmical v. Craven, supra. The fact that the source from which the grand jury panel which indicted the petitioner was chosen had not changed for such a lengthy period, indicates that the source could not reflect the relative changes in the sizes of the various elements that composed the Fairfield County population. The "constitutional imperative that the jury, grand or trial, fairly represent the community", Brooks v. Beto, 366 F. 2d 1 1 (1966), was not adequately served by the selection process utilized by the authorities of Fairfield County.

A plea in abatement and motion to quash directed against an indictment made by a grand jury selected from the

same grand jury panel from which the grand jury that indicted the petitioner was selected was sustained by the Superior Court for Fairfield County, Connecticut, on June 19, 1972, in Case Number 20804, State of Connecticut v. Maximino Villafane. The court in its decision stated, in part,

> "No criticism is intended the High Sheriff for Fairfield County for using the method which he has employed in this and other cases to select grand jurors. He has followed the course of all High Sheriffs in Connecticut back to the days of early common law in this state. While the system originally may have been adequate for its times, it is no longer adequate to these times, particularly in light of the considerable amount of case authority emanating from the state Supreme Court on this subject.
>
> The defendant has established a prima facie case of systematic exclusion because of the very nature of the selection process itself rather than the personal intention of the High Sheriff. While this method may be a time-honored tradition, it must nevertheless be judged in terms of modern day constitutionality."

The Connecticut Supreme Court on an appeal by the State reversed, stating:

> "The constitution demands only that the system employed by the state to select grand jurors produce an array from which a cognizable group or class of citizens has not been systematically excluded." Connecticut v. Villafane Vol. XXXIV, Conn. Law Journal No. 46, May 15, 1973, at p. 6.

Your petitioner has not been able to establish that there was any intentional discrimination by the sheriff in selecting the grand jury that indicted him. The selection system is being attacked as totally asystematic and accordingly as constitutionally intolerable. His claim rests on the ground that equal protection and due process both require that a grand jury be selected by a system or a process reasonably calculated to assure him a fair and impartial jury of his peers. The issue of systematic or intentional exclusion can neither be considered or evaluated except in the context of some kind of systematic selection procedure, and it is the absence of that kind of procedure that the petitioner claims is the essential constitutional infirmity of the grand jury which indicted him. It is the absence of the systematic procedure that constitutes discrimination against all in the county except those few selected by the High Sheriff to serve.

> "That kind of discrimination contravenes the very idea of a jury - 'a body truly representative of the community' - composed of 'the peers or equals of the person whose rights it is selected or summoned to determine; that is, of course, his neighbors, fellow associates, persons having the same legal status in society as that which he holds' ". (Footnotes omitted). Carter v. Jury Commission, supra, p. 330.

In selecting grand jurors from a list which had not changed with the relative changes in the community's population over a period fo several years; in excluding people of only average intelligence from the list; in making a deliberate effort to exclude people from a particular geographic area, the sheriff employed a selection system that posed a danger of abuse that cannot be tolerated according to the decisions in Avery and Williams, supra. The system used could not have resulted in the selection of a jury which reasonably approximated a fair cross-section of the community, since members of certain basic constituent classes of the community's population were excluded from the selection process from the outset.

IV

THE PETIT JURY THAT FOUND YOUR PETITIONER GUILTY WAS SELECTED IN VIOLATION OF YOUR PETITIONER'S RIGHT TO TRIAL BY AN IMPARTIAL JURY UNDER THE PROVISIONS OF THE SIXTH AMENDMENT.

On April 4, 1968, prior to the trial of your petitioner, he filed a challenge to the array, wherein he claimed, inter alia, that the jury panel had been selected in violation of his rights under the Sixth Amendment to the Constitution of the United States. (Page 4, Exhibit 4). This claim pursued on his appeal to the Connecticut Supreme Court, was in anticipation of the decision of the United States Supreme Court on May 20, 1968, in Duncan v. Louisiana, 391 U.S. 145, holding that the Sixth Amendment right to a petit jury was made applicable to the States through the due process clause of the Fourteenth Amendment.

Among the essential features of a jury guaranteed by the Sixth Amendment is, "a fair possibility for obtaining a representative cross-section of the community", Williams v. Florida, 399 U.S. 78, 100.

The Sixth Amendment is applicable here and the petitioner therefor has the standing to challenge the systematic exclusion of any identifiable group from the jury which convicted him. Peters v. Kiff, 407 U. S. 493.

Petitioner does not here challenge Connecticut's statutory scheme for the selection and summoning of petit juries. Section 51-221, Connecticut General Statutes provides a fair and constitutionally acceptable selection method, the essence of it is:

> "...on or before February 15 of each year, each jury committee shall select jurors in twice the number set forth in section 51-220 by drawing such jurors by lot from the electors' lists of each town..."

Your petitioner's claim is that there was a violation by various jury committees of this statutory mandate and that discriminatory procedures were used by various jury committees in developing the jury panel from which his petit jury was ultimately selected. This claim is supported by the Connecticut Supreme Court in its opinion in this case, where it states:

> "The actions of the jury committees in the six towns examined, Easton, Fairfield, Shelton, Stratford, Trumbull, and Westport, were contrary to the law and resulted in an improper selection of prospective jurors." (State v. Cobbs, 164 Conn. at 414).

The nature of the discrimination by the various jury committees named is detailed in Exhibit 4, pages 105 through 117.

Among other violations of constitutional requirements and statutory requirements, various of these jury committees:

A. Automatically excluded from service, women with children under sixteen years of age, although this status is by Connecticut statute an elective exemption; 51-218 C.G.S.

B. Excluded persons who desired not to serve.

C. Selected from any given family, wives rather than husbands.

D. Tended to exclude those persons who were unskilled and worked for a weekly wage.

E. Solicited volunteers from various organizations.

F. Exercised personal judgment in determining who would be suitable for service.

G. Failed to select jurors by lot from the elector's lists of each town, as required by 51-221 C.G.S.

The combined effect of some or all of the six jury committees which failed to follow the statutes, excluding some or all of the groups described was to prevent the jury panel from representing a fair cross section of the entire class of potential jurors in the communities from which the panel was chosen. This proposition seems self-evident, and the impracticality of presenting statistical proof of the under-representation of these admittedly excluded classes on the jury panel, should not result in denying petitioner his rights under the Sixth Amendment.

It has been suggested that failure to comply with a state's statutory requirement as to jury selection may render the resulting jury selection process unconstitutional. The U.S. District Court, ND Alabama considered a case of such non-compliance in Bokulich v. Jury Commission, 298 Fed. Sup. 181 (1968). With regard to the failure of certain Alabama jury selection committees to comply with the statutory requirements of that state as to jury selection, the court observed:

> "Compliance with selection procedures set by a state legislature does not necessarily meet constitutional standards. But if a jury selection system as provided by the Alabama statutes is fairly and officially administered without discrimination and in substantial compliance with the state statutes...the odds are very high that it will produce a constitutional result of a jury fairly representative of the community. Failure to comply with the state procedures will not necessarily produce an unconstitutional exclusion. But the fact of, and the extent of the failure in this case to comply with the procedures and the results contemplated by the Alabama system is strong evidence of unconstitutionality." Bokulich, supra.

NOTE: Various of the jury committees in question here violated important provisions of the Connecticut statutes regarding jury selection procedure. (See paragraphs A through G above.)

It should be noted that a newly evolving line of cases, perhaps best illustrated by Judge Aldrich's opinion in

Conner vs. Picard, 434, F. 2d. 673 (1970), stand for the proposition that failure to comply with State statutory provisions in dealing with a criminal defendant may deprive the individual of his rights under the equal protection of the laws provision of the Fourteenth Amendment. The classification created by making isolated criminal suspects or defendants subject to treatment not in accord with a State's statutory norms, cannot be tolerated absent a showing that the different treatment afforded those in the class is rationally related to a permissible state purpose.

The petitioner was denied his right to equal protection of the laws by being made subject to the atypical jury selection procedures employed by the various jury committees. See Dowd v. Cook, 340 U.S. 207; U. S. v. Fay, 241 F. Sup. 165; Clutchette et al v. Procunier, 328 F. Sup. 767; and Sawyer v. Sigler, 320 F. Sup. 690.

That the treatment petitioner received was not typical of that which other criminal defendants in other areas of Connecticut received can be presumed according to the opinion of Connecticut Supreme Court in this matter. (See State v. Cobbs 164 Conn. 402, at 413 and cases cited therein). The presumption is that jury committees acted in accordance with the mandatory statutory system. Cobbs at 413 - 14.

Although it is clear that the various jury committees acted in good faith, the fact of their good faith does not dispel a case of systematic exclusion. Jones v. Georgia, 389 U.S. 24, 25; Sims v. Georgia 389 U.S. 404, 407.

> "When a jury selection system actually results in master jury panels from which identifiable classes are grossly excluded, the subjective intent of those who develop and enforce this system is immaterial. Carmical, supra, at 587.

The unconstitutional result created by the under-reprsentation and the exclusion of weekly wage earners and women with children is not avoided or remedied by the fact that the jury committees in question may have acted in good faith and without intent to discriminate.

Attached to this memorandum as Appendix A (Exhibit 6, Defendant's Exhibit 1) is an analysis made of the jury panel which was challenged by the petitioner in his challenge to the array. Panel members from fourteen towns in the county were represented on the panel with which your petitioner was confronted. Fifty-five per cent of the total number of panel members came from lists of prospective jurors which the Connecticut Supreme Court, in this case, found illegally selected. Forty-five per cent of the panel came from towns whose selection procedures were not challenged by your petitioner. The illegal procedures used in the towns challenged resulted in a significant statistical anomaly.

Of the various classes exempt from jury service or

having a right of elective exemption from jury service in Connecticut, the largest by far is women with children under sixteen years of age. It is logical then, assuming equal numbers of males and females on voting lists, that there would be a greater number of males on any jury panel. This pattern is confirmed by the results of the eight towns on the panel which were not challenged, which show, of panel members submitted, forty-three per cent female. Quite the contrary is true in the six towns challenged which show sixty-five per cent female.

The automatic exclusion from jury committees of women entitled to an elective exemption from jury service under Connecticut law was unjustified. It was the holding of the court in Mayfield v. Steed, 345 Fed. Sup. 806 (U.S. Dist. Ct. ED Ark. 1972) that

> "The systematic exclusion of women is impermissible and cannot be justified on the basis that once selected, many, if not all, of those selected might elect to be excused from jury service." Mayfield, supra, at 808.

In Thiel v. Southern P. Company, 328 U.S. 217, the United States Supreme Court held that the blanket exclusion of wage earners from a jury service constituted a constitutional infirmity in the jury selected. The United States Supreme Court, in Thiel, recognized that "jury competence is an individual rather than a group or class matter," 328 U.S. at 221.

The good or bad intent of the jury committees in excluding weekly wage earners here is not significant. In Thiel, supra, the United States Supreme Court noted that daily wage earners had only been excluded from jury lists because their inclusion on the lists, and subsequent selection for jury service, might have caused them financial hardship. 328 U.S. at 222. Nonetheless the court concluded that the "exclusion of all those who earn a daily wage cannot be justified by federal or state law." Ibid.

The petitioner has a right to be tried by a jury selected from a pool representing all the various economic elements of his community. The fact that jury service might work an economic hardship upon certain daily or weekly wage earners, who might potentially be called to serve would provide no excuse for their automatic exclusion from the jury pool.

> "Jury service is a burden on all who serve. And of course, it falls most heavily upon daily wage earners. But this segment of the community is so large and so important that a jury system without daily wage earners is simply not representative of the community. Labat v. Bennett, 365 F. 2d. 698 (5th Cir. 1966).

Various of the jury committees in question tended to exclude weekly wage earners and automatically excluded women with children under sixteen, without taking regard of the

individual abilities of the members of these two classes to perform jury service. Such advance exclusions were not justified by Connecticut law, and they create danger that the petitioner was not tried by a jury chosen from a list representative of the various elements of the Fairfield County population.

Since trial by jurors selected from the broad spectrum of society is a constitutional mandate, Carmical, supra; Francis, et al v. Southern Pacific Co., 162 F. 2d 813 (10th Cir. 1947); and Labat, supra, and since the petitioner's jury was unjustifiably made unrepresentative of the broad spectrum of the Fairfield County community, the verdict returned by that jury cannot stand. Bary, supra and Woods v. Munns, 347 F. 2d. 948 (10th Cir. 1965).

The Sixth Amendment prohibits the arbitrary exclusion from jury service of the petitioner's class or any other. Glasser v. United States, 315 U.S. 60, 83-87; Thiel v. Southern Pacific Co., supra; Ballard v. United States, 329 U.S. 187.

Nor does the inability on the part of the petitioner to show "prejudice" from the illegal and improper selection of veniremen mitigate against his claim. When the selective technique itself is at issue, there is no need to show prejudice in the particular case involved. In

ruling objectionable the exclusion of women as jurors, this Court noted:

> "...reversible error does not depend on a showing of prejudice in an individual case ... the injury is not limited to the defendant -- there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." Ballard v. U.S., supra, p. 195.

In view of findings 209, 210, 216, 217, 218, 220, 224, 234, 239, 242, 243, 255, 271, 272, 274, 305, 306, and 312 on pages 105 through 117 of Exhibit 4, the petitioner sees no basis for the conclusion implicit in the opinion of the Connecticut Supreme Court, and cited by The District Court below (see Memorandum of Decision, Newman, J. at page 11) that the source of the Fairfield County Jury List "reasonably reflect(ed) a cross-section of the population suitable in character and intelligence" for jury duty. The conclusion is not sound in view of the unauthorized, subjectively based decisions of the members of the various jury committees to exclude certain types of people from the jury panel lists. These unauthorized exclusions prevented the jury panel list from representing a reasonable cross-section of the community.

V

STATEMENTS MADE BY THE PETITIONER WITHOUT THE ASSISTANCE OF COUNSEL DURING AN IN-CUSTODY INTERROGATION WERE ADMITTED IN EVIDENCE AGAINST HIM IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS

The petitioner was given verbal warnings of his constitutional rights on two occasions and was given a written notification of rights which was set forth in the record. The findings of the Supreme Court of Connecticut (findings 332-420, pages 128-37, Exhibit 4) detailed the circumstances in which the statements in question here were made. After having been at the police station for a few hours, the petitioner told the police that he should talk to an attorney. (finding 363, page 131, Exhibit 4). The petitioner was given free use of a telephone. He made statements to the police after receiving his Miranda warnings, and after having asked to see an attorney, but before a lawyer had been provided. (finding 413, page 436, Exhibit 4). Given the "totality of the circumstances", petitioner's statement made after his having asked to see an attorney were a product of in-custody police interrogation, and should not have been admitted in evidence against him. Culombe v. Connecticut, 367, U.S. 568.

The statements were admitted against the petitioner in violation of his privilege against self-incrimination under the provisions of Fifth Amendment of the Constitution of the United States since, considering the totality of the circumstances, they were not voluntarily made.

The statements were also admitted in violation of the petitioner's Sixth Amendment right to assistance of counsel, and in violation of his rights to due process and equal protection under the Fourteenth Amendment, since the statements in question here were made after the petitioner had requested counsel, but before it had been supplied.

As the Court stated in Miranda, supra,

> "The entire thrust of police interrogation...was to put the defendant in such an emotional state as to impair his capacity for rational judgment. The abdication of the constitutional privilege - the choice on his part to speak to the police - was not made knowingly or competently ...; the compeling atmosphere of in-custody interrogation, and not the independent decision on his part, caused the defendant to speak."

It is vital to the principals involved in this case that the record shows that, on at least one occasion during the period that the petitioner gave statements, ultimately used against him, to the police, he indicated to the police that he wanted to see a lawyer "before I tell you what actually went on or what happened." (finding 413, page 136, Exhibit 4).

After the petitioner indicated that he wanted to call an attorney, the police thrust the telephone in front of him. The situation in question here is analogous to the one dealt with by the United States Supreme Court in Culombe v. Connecticut, Supra. There, the United States Supreme Court reversed a defendant's conviction for murder in the first degree, a conviction which was based on a confession found to be involuntary. The Court, in separate opinions held that the confession obtained under the circumstances was involuntary and that the conviction based upon the confession violated due process. The Court found that the defendant, in effect, told the police that he wanted counsel. His request was frustrated by the fact that although the defendant was shown the telephone directory at police headquarters when he stated that he wanted to see a lawyer, the defendant did not know the name of any particular attorney, and the police did not regard it as an appropriate practice for them to suggest attorneys' names to prisoners. No attorney was summoned and the defendant began to answer questions.

Justices Douglas and Black, in their concurring opinions, state that they would reverse the petitioner's conviction on the ground that the denial of his request

that he be given the assistance of counsel during police interrogation was a violation of his constitutional rights under the Sixth Amendment in conjunction with the privilege against self-incrimination under the Fifth Amendment.

The fact that the petitioner was given use of a telephone after he had asked to see an attorney does not provide evidence that his constitutional rights were respected. The restrictions on authorities continuing the taking of statements from an individual under these circumstances is clearly spelled out in Miranda, supra

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point, he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of an in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to the police, they must respect his decision to remain silent." Miranda v. Arizona, supra, 473.

Petitioner was in custody; he had been arrested for murder and told that the police had all the evidence they needed against him (finding 352, page 130, Exhibit 4). He asked to see a lawyer, but none was provided prior to his making the statements in question. In these trying circumstances, petitioner's request for counsel should have been complied with before any additional statements were taken from him. Considering the circumstances, the fact that Lieutenant Fabrizi asked an occasional question (finding 348, page 129, Exhibit 4) and the fact that the advice and aide of counsel had not been provided, although it had been requested, statements made by the petitioner after his request for counsel (findings 412-13, page 136, Exhibit 4) should not have been admitted against him at trial.

The Supreme Court in Miranda stated that, where an interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retain or have appointed counsel. Miranda v. Arizona, supra, 475.

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation in evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver." Carnley v. Cochrane, 369 U.S. 506.

Rather than showing the waiver by the petitioner of his right to counsel, the record indicates a desire on his part that he have the assistance of counsel while at police headquarters. Statements given by the defendant voluntarily, before he indicated his desire to have an attorney, do not constitute any waiver of his privilege to have counsel or to remain silent.

> "Moreover where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated." Miranda v. Arizona, supra, 475.

The statements given by the petitioner after he had requested an attorney, and before one had been provided, and testified to by Lt. Fabrizi and Sgt. Nerkowski, should not have been admitted in evidence, since they were taken and used in violation of petitioner's rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

APPENDIX A

ANALYSIS

DEFENDANT'S EXHIBIT #1 PRELIMINARY

"Fairfield County at Bridgeport
Jurors - Monday, April 1, 1968"

Town	Male Jurors	Female Jurors	Total	%Female
Bridgeport	26	20	46	43
Greenwich	4	2	6	33
Monroe	1	2	3	66
New Canaan	1	0	1	0
Newtown	1	0	1	0
Redding	0	1	1	100
Weston	2	0	2	0
Wilton	0	1	1	100
Subtotal	35	26	61	43
Easton	1	6	7	86
Fairfield	3	7	10	70
Shelton	3	12	15	80
Stratford	6	8	14	57
Trumbull	3	10	13	77
Westport	11	6	17	35
Subtotal	27	49	76	65
Grand Total	62	75	137	55

% of array from challenged towns - 55%

CONCLUSION

For the reasons stated, petitioner's conviction was in violation of the Constitution of the United States, and the writ of habeas corpus requested should issue.

PETITIONER

BY _____
BERNARD GREEN
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Bridgeport, Connecticut 06604

Attorney for Petitioner

This is to certify that a copy of the foregoing Petitioner Appellant's Brief was mailed, postage prepaid, to Donald A. Browne, Esq., State's Attorney for Fairfield County, 1061 Main Street, Bridgeport, Connecticut 06604.

_____
BERNARD GREEN
COMMISSIONER OF THE SUPERIOR COURT